Some thoughts on *Ilott v. Mitson*

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Following a recent seminar held in my chambers, which included a lively discussion with audience members, I thought that it may be useful to set down in writing some thoughts on the recent Supreme Court decision in Ilott v. Mitson (reported *sub nom* Ilott v. Blue Cross and others) [2017] UKSC 17; [2017] 2 WLR 979.

Background

The facts of Ilott are now well-known. Mrs Ilott's mother disapproved of her choice of boyfriend which led to a 26 year estrangement between them. The mother left a will in favour of animal charities. Following the mother's death in 2004, Mrs Ilott launched a 1975 Act claim. By that stage she was living with her husband and 5 children in a house rented from a Housing Association and their income largely comprised state benefits, some of which were means tested.

At first instance the District Judge awarded Mrs Ilott £50,000. That was overturned on appeal by the High Court, where it was held that her claim failed. She successfully appealed to the Court of Appeal who held that her claim should succeed, but remitted the issue of quantum to the High Court. The High Court upheld the District Judge's award of £50,000. That was overturned on appeal by the Court of Appeal, who granted Mrs Ilott the sum of £143,000 to allow her to purchase her house (with a discount under the right to buy provisions), plus an option to draw down a further sum of £20,000 at will. It was the charities' appeal from that decision which led to the Supreme Court's recent judgment.

Lord Hughes' judgment

The lead judgment of the Supreme Court was given by Lord Hughes, who focused on two key issues: discount and benefits.

As regards discount, the District Judge had held that Mrs Ilott's award should be discounted to reflect the fact that she had no expectation of benefit from her mother's estate. The Court of Appeal criticised the District Judge for failing to identify the extent of that discount, but Lord Hughes considered that criticism misplaced: "*The Act requires a single assessment by the judge of what reasonable financial provision should be in all the circumstances of the case. It does not require the judge to fix some hypothetical standard of reasonable financial provision and then either add to it, or discount from it, by percentage points or otherwise, for variable factors*" (para 34).

As regards benefits, the District Judge had not been presented with any figures to show the effect which a capital award would have on Mrs Ilott's state benefit. He therefore made two assumptions: (1) that if Mrs Ilott purchased her house she would lose her entitlement to housing benefits, so that her income would only increase by £912 per year; and (2) that if Mrs Ilott received a large amount of capital, that would disentitle her from most if not all of the benefits she received. The Court of Appeal was critical of this approach, saying that the District Judge should have called for chapter and verse to verify these assumptions; but Lord Hughes disagreed, pointing out that the assumptions were in fact correct, or at least were not "*wrong to the disadvantage of the claimant*" (para 38).

More fundamentally, the Court of Appeal had held that the District Judge's award had no practical value to Mrs Ilott since, until such time as her capital reduced below the £16,000 threshold, the award would disentitle her to the means tested benefits which she would have otherwise received. Mrs Ilott could avoid this by spending sufficient money to reduce her capital below the £16,000 threshold, but the Court of Appeal deprecated such a "spending spree". Lord Hughes again disagreed. It was part of Mrs Ilott's claim that she needed money to replace worn out household equipment and to refurbish her house; and the District Judge's award would allow her to do just

that. Mrs Ilott "*could put her household onto a much sounder footing without for long retaining capital beyond the £16,000 ceiling…*" (para 41).

Lady Hale's judgment

The only other reasoned judgment was given by Lady Hale, who noted research which demonstrated a wide range of public opinion about the circumstances in which adult children ought or ought not to be able make a claim against their parent's estate. She lamented the fact that the law gave virtually no guidance in how to evaluate such claims or balance them against other claims on the estate.

Lady Hale took the view that a reasonable case could be made for 3 possible solutions to Mrs Ilott's claim: (1) to dismiss it outright; (2) to buy her house and settle it on trust for her for life with remainder to the charities; or (3) to award her £50,000 as the District Judge had done. Lady Hale hinted that options (1) and (2) may be preferable to (3), but held that ultimately the decision was a value judgment for the District Judge to take and his decision should not be disturbed on appeal.

Orthodoxy maintained

Despite the fact that Ilott was the first 1975 Act claim ever to reach the Supreme Court, Lord Hughes' judgment in many respects confirms the existing case law. In particular, he confirmed that:

(1) Maintenance "*cannot extend to any or every thing which it would be desirable for the claimant to have. It must import provision to meet the everyday expenses of living*"; and the classic definition of maintenance given by Browne-Wilkinson J in In Re Dennis, dec'd [1981] 2 All ER 140, 145-146, was approved as being "*helpful*" (para 14).

(2) Maintenance is "*flexible and falls to be assessed on the facts of each case. It is not limited to subsistence level*" (para 15).

(3) It will "*very often*" be more appropriate to satisfy an income need by a capitalised lump sum based on the family Duxbury tables (para 15).

(4) The test under the Act is an objective one; the test is not whether the deceased acted reasonably, although that is capable of being a relevant factor under s.3(1)(g) (paras 16 and 17).

(5) The classic analysis of claims by adult children by Oliver J in Re Coventry [1980] Ch 461 was approved, with the familiar qualification that "*[t]here is no requirement for a moral claim as a sine qua non for all applications under the 1975 Act*" (paras 18 to 20);

(6) The conventional "2-stage test" was approved, Lord Hughes stating that the 2 questions "*will usually become (1) did the will/intestacy make reasonable financial provision for the claimant and (2) if not, what reasonable provision ought now to be made for him?*" (para 23).

(7) A 1975 Act claim should be assessed in the light of the facts as they exist at the date of the hearing: see s.3(5) of the Act. On appeal the evidence must be taken as it stood before the first instance judge, and "*any request to adduce further evidence will have to be judged by ordinary Ladd v. Marshall principles (see [1954] 1 WLR 1489)*" (para 25).

Testamentary freedom

A notable feature of the Supreme Court decision is the emphasis on the principle of testamentary freedom.

Lord Hughes' judgment starts with the proposition that "*[u]nlike some other systems, English law recognises the freedom of individuals to dispose of their assets by will after death in whatever manner they wish*" (para 1). He went on to note that Mrs Ilott's mother's will was accompanied by a side letter "*which stated her settled conclusion that no provision should be made for Mrs Ilott, saying that she felt no moral or financial obligation towards her in view of what had happened, and it instructed her executors to resist any claim which Mrs Ilott may make*". Whilst the mother had left her

estate to charities with which she had no particular connection during her lifetime, they "*represented her freely made and considered choice of beneficiaries*" (para 6).

Lord Hughes criticised the Court of Appeal's generous award as giving "*little if any weight to the quarter century of estrangement or to the testator's very clear wishes*". The Court of Appeal had downplayed these factors, particularly in view of the fact that Mrs Ilott's lack of expectation of benefit was counterbalanced by the fact that the charities likewise had no expectation of benefit, but Lord Hughes stated that these views should be "*treated with caution*" (para 46).

This emphasis on testamentary freedom will be welcome to all defendants opposing claims under the Act. It also reinforces the good sense in a testator including, either in the will itself or in a side letter, a statement explaining why they have decided to dispose of their estate as they have: c.f. Re Coventry [1980] Ch 461, 488H, where Goff LJ (as he then was) said that express reasons for not including provision for the claimant "*may be very relevant*". The will draftsman should however take care to ensure that such statements are both factually accurate and sensible, otherwise they may prove counterproductive.

Charities

Lord Hughes' judgment arguably gives rather generous treatment to charities. In the Court of Appeal the charities had conceded that they had no financial needs as such, and they clearly had no expectation of benefit from the deceased's estate. Did that mean that Mrs Ilott's claim should be treated more generously? The Court of Appeal thought that it did, as the charity would not be prejudiced by an award in Mrs Ilott's favour. But Lord Hughes took a very different view, saying that the Court of Appeal's comments were "*erroneous*". This was firstly because charities "*depend heavily on testamentary bequests for their work*"; secondly because the charities "*were the chosen beneficiaries of the deceased*" and, as such, "they did not need to justify a claim on the basis of need under the 1975 Act, as Mrs Ilott necessarily had to do"; and thirdly because "*it cannot be ignored that an award under the Act is at the expense of those whom the testator intended to benefit*" (para 46).

These comments will be welcomed by all charities, and indeed by all defendants. But they are not without their difficulties. The emphasis on the charities' dependence on bequests sits somewhat uneasily with the concession that they had no financial needs. It may be that such concessions will not be made in future. More fundamentally, one is left wondering what happened to s.3(1)(c) of the Act, which expressly requires the court to take into account is "*the financial resources and financial needs of any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future*". Even if beneficiaries do not need to justify a claim on the basis of need, surely the absence of any need on their part is still a relevant factor and may justify a more generous award in favour of the claimant?

Life interests

A feature of the Supreme Court's decision which has given rise to much debate is the comment – made by both Lord Hughes and Lady Hale – that the concept of maintenance will generally militate in favour of satisfying a claimant's housing need by the grant of a life interest rather than outright capital.

Thus Lord Hughes stated that "*If housing is provided by way of maintenance, it is likely more often to be provided by such a life interest rather than by a capital sum*". He expressly approved the case of In Re Myers [2004] EWHC 1944 (Fam); [2005] WTLR 851, where Munby J (as he then was) granted a claimant a life interest to satisfy her housing need "*together with power of advancement designed to cater for the possibility of care expenses in advanced old age*".

Likewise Lady Hale stated "*It is difficult to reconcile the grant of an absolute interest in real property with the concept of reasonable financial provision for maintenance: buying the house and settling it on [Mrs Ilott] for life with reversion to the estate would be more compatible with that*".

In practice, clients often find life interest trusts unattractive. Trusts force the claimant and the beneficiaries into an ongoing relationship, rather than creating a "clean break". They can be expensive to run, particularly if there are professional trustees. They can force a claimant to remain in the same property against their will, unless they contain provisions allowing the trust to be transferred. Conditions as to repair, insurance and early termination (e.g. on re-marriage or cohabitation) can give rise

to satellite litigation. Such trusts can also give rise to undesirable tax consequences: for example, the life tenant's death may give rise to a substantial IHT bill. Life interest trusts may also be an unattractive solution for any lawyers acting on a conditional fee agreement, since there may be no capital out of which any uplift can be paid.

However, these points may now carry less weight with the courts than they did previously. Indeed, the argument that a life interest would be inappropriate where there is animosity between the parties was rejected by Marcus Smith J. in Martin v. Williams [2017] EWHC 491 (Ch), a decision handed down only 2 days before that in Ilott, as follows (at para 63):

"*Turning to the second point, which is the risk that animosity will render the order I am minded to make unworkable. I reject this argument. In the first place, the order is not so complex as to be capable of being thwarted by such animosity as may exist between the parties. In the second place, I am very conscious that personal litigation between individuals, in which they each have much to lose, is capable of engendering strong and hostile personal feelings. My sense is that, once this matter is finally resolved, and conscious now (if they were not before) of the costs of litigation (both financial and otherwise), the parties will be able to work together to the extent necessary.*"

The question arises whether the grant of an absolute, rather than a life, interest in a property could *ever* be appropriate to satisfy the housing needs of any claimant whose claim is limited to maintenance. No doubt this is an issue which will be worked out in subsequent case law. One candidate for an outright interest may be a claimant who had a strong moral claim to outright ownership, for example where the deceased had promised to give a property to the claimant outright, or made a will to that effect which was invalid for technical reasons. Another candidate may be an unmarried cohabitee: c.f. Negus v. Bahouse [2008] EWCA Civ 1002; [2012] WTLR 1117, where the Court of Appeal (including Munby J.) upheld the award of a property outright and mortgage free to an unmarried cohabitee, notwithstanding that the Appellant had drawn the court's attention to In Re Myers (supra); and the Court of Appeal expressly approved the first instance judge's statement that maintenance had to be judged in the context of the claimant's lavish lifestyle with the deceased, not her relatively impoverished lifestyle before she met him.

An alternative approach, which may now become more common in practice, was that adopted by Judge Norris QC (as he then was) in Churchill v. Roach [2002] EWHC 3230 (Ch); [2004] 2 FLR 989. In that case it was held that a life interest would be appropriate in theory. In practice, however, it was not felt appropriate, particularly given the animosity between the parties and the fact that the claimant was relatively young, meaning that the beneficiaries' reversionary interest would not vest for many years hence. So instead the award took the form of the transfer the property to the claimant outright but subject to a charge in favour of the estate to secure payment of a sum equal to the capitalised value of the estate's reversionary interest (which on the facts was found broadly to equate to one-third of the value of the property) within 12 months. The expectation was that the claimant could raise that sum by re-mortgaging the property within that time frame.

Schedule of needs

The fact that housing needs are often to be satisfied by the grant of a life interest means that it is all the more important to adduce clear evidence of income or capital needs if the client's aim is to receive an outright capital award. Lord Hughes suggested that Mrs Ilott's maintenance needs extended not only to "*essential white goods, basic carpeting, floor covering and curtains, and the replacement of worn out and broken beds*", but also to "*other similar necessities such as a reliable car, [and] a holiday*" (para 40). Expect to see cars and holidays appearing in more financial schedules from now on!

State benefits

The decision in Ilott is a cautionary tale for anyone acting for a claimant in receipt of means-tested state benefits. In such cases it is essential to provide the court with the necessary materials to explain the effect which any given award will have on the claimant's entitlement to benefits. If in doubt, seek specialist advice on this topic. Ironically, Lord Hughes made the point that the option to draw down £20,000 granted to Mrs Ilott by the Court of Appeal would itself fall foul of the deliberate deprivation of capital rules, to which the Court of Appeal had not been referred.

In some previous cases the courts have made an award in the form of a discretionary trust in which the claimant is named as a discretionary object, the idea

being that in such circumstances the claimant will not be treated as having an interest in the trust fund which could prejudice their benefits entitlement: see, for example, Hanbury v. Hanbury [1999] 2 FLR 255 and Challinor v. Challinor [2009] EWHC 180 (Ch); [2009] WTLR 931. It is a striking of Ilott that this possibility is not discussed in the judgment. Whether it will continue to be adopted by courts in future cases remains to be seen.

Appeals

In many ways the hero of Ilott v. Mitson is the District Judge whose first instance decision, made as long ago as 2007, has now at long last been vindicated. The inordinate time (and no doubt expense) of the appeal process in this case serves as a salutary warning to anyone proposing to launch an appeal against a first instance decision in a 1975 Act case.

Lord Hughes indicated that appeals would only be allowed in very limited circumstances (at para 24):

"*The order made by the judge ought to be upset only if he has erred in principle or in law. An appellate court will be very slow to interfere and should never do so simply on the grounds that its judge(s) would have been inclined, if sitting at first instance, to have reached a different conclusion. The well-known observations of Lord Hoffmann in Piglowska v Piglowski [1999] 1 WLR 1360 esp at 1373-1374 are directly in point. It is to "kill the parties with kindness" to permit marginal appeals in cases which are essentially individual value judgments such as those under the 1975 Act should be.*"

Having said that, the recent decision in Martin v. Williams (supra) is an example of a successful appeal. The Judge on appeal held that the first instance judge had erred, firstly by leaving out of account the claimant's interest in a property in Bristol co-owned with her sister, and secondly by rejecting the beneficiary's evidence of her financial position despite the fact that that evidence was not challenged. The appeal succeeded because the errors were ones of principle, rather than challenges to the first instance judge's value judgments.

Unpredictability

The reality which emerges from the Ilott decision is just how unpredictable the outcome of 1975 Act claims can be. It is striking that Lady Hale suggests that the District Judge could have legitimately made an award ranging anywhere between zero, £50,000 and the life interest in a property, without his decision being susceptible to appeal in any of those cases. This, when combined with the inherent difficulty in appealing, as discussed above, means that there must be a powerful incentive to settle any 1975 Act claim rather than take it to trial.

This seems to be the general direction of travel in private client litigation. There are a number of other causes of action which involve value judgments or the exercise of a discretion which will be inherently difficult to appeal: for example, common intention constructive trusts along the lines discussed in Jones v. Kernott [2011] UKSC 53; and proprietary estoppel claims of the kind discussed in Davies v. Davies [2016] EWCA Civ 463. Indeed, in Gill v. Woodall [2010] EWCA Civ 1430 Lord Neuberger expressly stated (at para 16) that the courts should, as a matter of policy, discourage claims to challenge the validity of wills, because:

"*If judges were too ready to accept such contentions, it would risk undermining what may be regarded as a fundamental principle of English law, namely that people should in general be free to leave their property as they choose, and it would run the danger of encouraging people to contest wills, which could result in many estates being diminished by substantial legal costs.*"

Settlement is not only cheaper, quicker and less risky than litigation, but gives the parties control over the form of any award in the claimant's favour. Thus if the parties are not attracted by the idea of the claimant having a life interest in the property, they can devise some alternative form of provision which may be more acceptable. Likewise, a settlement may allow the parties to make use of valuable tax planning opportunities which might not be available at court.

The future

Much of the press generated by the Ilott decision characterised it as a mighty victory for the charities over Mrs Ilott. But the fact is that whilst the charities may have succeeded on the appeal, the net result was that Mrs Ilott was granted £50,000 rather than nothing at all. Many clients would regard that as a sum worth fighting over.

Further, it is worth noting that the claimant in In Re Myers (supra), the case which was expressly approved by Lord Hughes, received substantial provision (albeit admittedly out of a large estate) in the form not only of a life interest in a property but also substantial outright capital sums to meet her income and other needs.

The publicity generated by the Ilott decision will bring the 1975 Act jurisdiction to the attention of members of the public, many of whom may have been unaware of the Act's existence until now.

The Ilott decision will have little relevance for claims by spouses and civil partners which are not limited to maintenance.

In those circumstances it seems unlikely that the Ilott decision will discourage claimants from advancing 1975 Act claims, even against charity defendants, albeit that the expectation must be that the vast majority of those claims will settle before they ever reach court.

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